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No. 92-850

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In The

Supreme Court of the United States

October Term, 1992

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as Respresentatives of a Nationwide Class Consisting of 150,290 Lifetime Partners and of 27,839 Persons Who Have Partially Paid for Lifetime Partnerships,

Petitioners,

v.

EMPLOYERS REINSURANCE CORPORATION,

Respondent,

JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,

Defendants.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Fourth Circuit correctly hold that, under North Carolina substantive law, the interpretation of the plain, unambiguous language of the Multimedia Policy was a legal issue, not a question of fact?

II. Did the Fourth Circuit correctly interpret the Multimedia Policy and correctly hold that North Carolina law does not permit Teague to change the plain terms of the policy by distorting the policy's language or using irrelevant and inadmissible extrinsic evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

I. PROCEDURAL BACKGROUND 2

II. FACTUAL BACKGROUND 3

A. PTL's Purchase Of The Multimedia Policy 3

B. The Multimedia Policy 4

C. Claims By Lifetime Partners 5

D. The Judgment Against Bakker 6

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW BY THE SUPREME COURT 7

A. The Court Should Not Grant Certiorari To Second Guess The Fourth Circuit's Application Of North Carolina Law 8

B. Teague's Attempt To Create The Illusion Of A Federal Question Is Without Merit 9

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF THE MULTIMEDIA POLICY DOES NOT INDEMNIFY JAMES O. BAKKER AGAINST LIABILITY FOR HIS OWN FRAUD 14

TABLE OF CONTENTS – Continued

Page

A. North Carolina Law Does Not Permit Creation of Indemnification for Bakker Against Liability for His Own Fraud Through Distortion of the Policy Language 14

B. The Policy Is Not Ambiguous Under North Carolina Law 20

C. The Lower Courts Properly Rejected Teague's Attempt To Find Ambiguity Through Strained Reading And Irrelevant Extrinsic Evidence 22

1. It Is Irrelevant That Other Policy Provisions Create Other Types Of Coverage 22

2. The Absence Of A Fraud Exclusion Is Irrelevant Unless The Coverage Provision Creates Fraud Coverage 23

3. Language In Other ERC Policies Is Irrelevant 24

4. Teague's Purported Expert Affidavits Are Irrelevant 25

5. The Testimony Of Other Witnesses Is Irrelevant And Does Not Support Teague 26

6. Teague May Not Use Non-Existent Facts To Support His Petition 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986) 26

American Home Assurance Co. v. Osbourn, 47 Md. App. 73, 422 A.2d 8 (Md. Ct. Spec. App. 1980) 23

Amos v. Coffee, 288 Va. 88, 320 S.E.2d 335 (Va. 1984) 12

Barbee v. Harford Mutual Ins. Co., 330 N.C. 100, 408 S.E.2d 840 (1991) 11

Big B Transportation, Inc. v. U.S. Ins. Group, 93 N.C. App. 233, 377 S.E.2d 278 (1989)..... 19

Britt v. Upchurch, 327 N.C. 454, 396 S.E.2d 318 (1990) 22

Burger King Corp. v. Horn & Hardart Co., 893 F.2d 525 (2d Cir. 1990) 12

Butler v. City of Vero Beach, 495 So. 2d 266 (Fla. Dist. Ct. App. 1986) 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 8

Chatton v. National Union Fire Ins. Co. of Pittsburgh, P.A., 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992) 18, 26

Chimart Assocs. v. Paul, 66 N.Y.2d 570, 498 N.Y.S.2d 344, 489 N.E.2d 231 (N.Y. 1986)..... 12

Cohan v. Thurston, 223 Va. 523, 292 S.E.2d 45 (Va. 1982)..... 12

TABLE OF AUTHORITIES – Continued

Page

Country Floors, Inc. v. Partnership, 930 F.2d 1056 (3rd Cir. 1991) 13

County of Erie v. American States Ins. Co., 573 F. Supp. 479 (W.D. Pa. 1983) *aff'd*, 745 F.2d 45 (3rd Cir. 1984) 26

Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co., 475 F. Supp. 586 (W.D. Pa. 1979), *modified on other grounds*, 632 F.2d 1068 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) 25

Employer's Reinsurance Corp. v. Martin, Gordon & Jones, Inc., 767 F. Supp. 1355 (S.D. Miss. 1991) 16

E-Z Loader Boat Trailers v. Travelers Indemn. Co., 106 Wash. 2d 901, 726 P.2d 439 (1986) 18

Golf Course Superintendents Ass'n of America v. Underwriters at Lloyd's, London, 761 F. Supp. 1485 (D. Kan. 1991) 15, 20, 24

Grant v. Emmco Ins. Co., 295 N.C. 39, 243 S.E.2d 894 (1978) 15

Guardian Life Ins. Co. of America v. Richardson, 129 S.W.2d 1107 (Tenn. App. 1939) 18

Haigler v. City of New York, 135 A.D.2d 362, 521 N.Y.S.2d 428 (1987) 18

Huddleston v. Dwyer, 322 U.S. 232 (1944) 8

TABLE OF AUTHORITIES – Continued

Page

Keys v. Sambo's Restaurant, Inc., 389 So. 2d 1360 (La. Ct. App. 1980), *aff'd*, 398 So. 2d 1083 (La. 1981) 18

Kirk v. Nationwide Mut. Ins. Co., 254 N.C. 651, 119 S.E.2d 645 (1961) 11

LeDoux v. Iowa Nat. Mut. Ins. Co., 262 N.W.2d 418 (Minn. 1978) 23

Loeb v. Hammond, 407 F.2d 779 (7th Cir. 1969) 26

Magnum Import Co. v. Coty, 262 U.S. 159, 67 L.Ed. 922, 43 S.Ct. 531 (1923) 8

Marx & Company, Inc. v. The Diners' Club, Inc., 550 F.2d 505 (2d Cir. 1977), *cert. den.*, 434 U.S. 861 (1977) 26

McMahon v. Boston Old Colony Ins. Co., 67 A.D. 2d 757, 412 N.Y.S.2d 465 (N.Y. App. Div. 1979) 24

Metric Constructors, Inc. v. Industrial Risk Insurers, 102 N.C. App. 59, 401 S.E.2d 126 (N.C. 1991) 10

Nationwide Mut. Ins. Co. v. Akers, 340 F.2d 150 (4th Cir. 1965) 25

Phillips v. Union Bankers Ins. Co., 812 S.W.2d 616 (Tex. Ct. App. 1991) 12

Port of Portland v. Water Quality Insurance Syndicate, 796 F.2d 1188 (9th Cir. 1986) 12, 20

Presidential Hotel v. Canal Ins. Co., 188 Ga. App. 609, 373 S.E.2d 671 (1988) 18

TABLE OF AUTHORITIES – Continued

Page

Queens Ins. Co. of America v. Meyer Milling Co., 43 F.2d 885 (8th Cir. 1930) 21

Radiator Specialty Company v. First State Insurance Company, 651 F. Supp. 439 (W.D.N.C. 1987), *aff'd*, 836 F.2d 193 (4th Cir. 1987) 10, 21, 26

Raffles v. Wichelshause, 2 Howd. N.C. 906, 159 Eng. Rep. 375 (Ex. 1869) 22

Redd v. Taylor, 270 N.C. 14, 153 S.E.2d 761 (1967) 21

Reliance Insurance Co. v. General Reinsurance Corp., 506 F. Supp. 1042 (E.D. Pa. 1980) 16

Richards v. Fireman's Fund Ins. Co., 417 N.W.2d 663 (Minn. App. 1988) 16

S&F Trading Co. v. Carson, 87 N.C. App. 602, 361 S.E.2d 897 (1987) 12

Saloomey v. Jeppesen & Co., 707 F.2d 671 (2d Cir. 1983) 5

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Sirvint v. Fidelity & Deposit Co., 242 A.D. 187, 272 N.Y.S. 555 (N.Y. App. Div. 1934), *aff'd*, 266 N.Y. 482, 195 N.E. 164 (1934) 17

Slaughter v. State Capital Life Insurance Co., 250 N.C. 265, 108 S.E.2d 438 (1959) 11, 23

Smith v. Nationwide Mut. Ins. Co., 214 Conn. 734, 573 A.2d 740 (1990) 24

Squires v. Textile Ins. Co., 250 N.C. 580, 108 S.E.2d 908 (1959) 11

TABLE OF AUTHORITIES – Continued

Page

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United States for Westchester Elec. v. Sentry Ins., 774 F.2d 80 (4th Cir. 1985) 11

Urtado v. Shupe, 33 Colo. App. 162, 517 P.2d 1357 (1973), *aff'd en banc*, 187 Colo. 24, 528 P.2d 222 (1974) 24

Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 122 S.E.2d 518 (1970) 12, 14, 20, 21, 23, 24

Walker v. Durham Life Ins. Co., 90 N.C.App. 191, 368 S.E.2d 43 (1988) 11

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986).... 11, 15, 21

Western Fire Ins. Co. v. Wallis, 289 Or. 303, 613 P.2d 36 (1980) 20

STATUTES:

18 U.S.C. § 1341 (Supp. 1989) 17

18 U.S.C. § 1342 (1988) 17

18 U.S.C. § 1343 (1988) 17

OTHER SOURCES:

13 *Moore's Federal Practice* ¶ 810.25-1[3] 9

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TABLE OF AUTHORITIES – Continued

Page

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Webster's Third New International Dictionary 2635 18

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Employers Reinsurance Corporation ["ERC"] opposes the Petition for Writ of Certiorari in this case. Joseph Teague and others ["Teague"] ask this Court to review an unreported decision by the United States Court of Appeals for the Fourth Circuit affirming, *per curiam*, an unreported district court opinion granting

summary judgment on an issue of state law. Both the Fourth Circuit and the district court held that a libel and allied torts indemnity policy [the "Multimedia Policy"] issued to PTL by ERC, does not indemnify James O. Bakker ["Bakker"] for liability for his own common law fraud.

The Fourth Circuit's unanimous decision in this diversity action rests solely on state law. The circuits are not split on any federal principle which would affect the outcome. Thus, the case does not present an issue of federal law for resolution by the Supreme Court.

In addition, the Fourth Circuit, like the District Court, decided the controlling state law question correctly.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND.

ERC filed this diversity action in the United States District Court for the Western District of North Carolina on April 27, 1990. It sought a declaration that the Multimedia Policy does not indemnify PTL officers and directors for claims by persons defrauded by PTL's "lifetime partner" program. The original defendants were Bakker, David Taggart and Aimee Cortese, three former PTL officers and directors against whom such claims had been made. Teague intervened on behalf of a class of "lifetime partners" whom he represents in a class action against Bakker, Taggart, Cortese and others [the *"Teague* Class

Action"]. Teague claims that the Multimedia Policy covers the judgment for common law fraud entered against Bakker in the *Teague* Class Action.[1]

On October 16, 1991, after discovery and full briefing, the district court granted ERC's motion for summary judgment that the Multimedia Policy does not indemnify Bakker for the fraud judgment. [App. 1032.][2] The court entered final judgment pursuant to Rule 54(b), Fed. R. Civ. P. [App. 1033-34.]

Teague's appeal was fully briefed, and a panel of the Fourth Circuit heard oral argument on May 7, 1992. On August 14, 1992, the panel unanimously affirmed the district court's judgment. [Appendix to Petition for Certiorari at A-1.] The court then denied Teague's Petition for Rehearing and Suggestion for Rehearing *En Banc*, by order filed September 24, 1992. [*Id.* at A-7.]

II. FACTUAL BACKGROUND.

A. PTL's Purchase Of The Multimedia Policy.

PTL bought the Multimedia Policy to protect itself against "libel, slander and related actions." In 1980, an insurance consultant's report reviewed PTL's entire insurance program [App. 761-76] and recommended, among other things, that PTL get libel coverage:

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[1] Teague also contended that the policy covered claims against Cortese and Taggart, but trial of the *Teague* Class Action mooted that contention. The lifetime partners lost on all claims against Taggart and Cortese, and they won against Bakker solely on common law fraud. [App. 713-17.]

[2] References to "App." in this brief refer to the Joint Appendix filed with the Fourth Circuit.

> PTL's broadcasting and telecasting activities expose the organization to potential suits arising out of libel, slander and related actions. No insurance is in effect for these exposures.

[App. 776.] PTL's "insurance coordinator," Dave Cadwell, implemented the consultant's recommendation by obtaining an ERC libel and related torts policy for PTL's Ohio television station, WJAN-TV, effective November 1980. [App. 757-58 (¶ 9).]

In 1982, PTL, through Mr. Cadwell, elected to extend the coverage to PTL's Charlotte operations. [App. 410; 758 (¶ 10).] ERC quoted and bound the coverage based on its "Broadcasters Broadform" policy [App. 435-37], but it actually issued the policy on its "multimedia policy" form because PTL used both print and broadcast media. The resulting Policy No. MML-044 [App. 1-26] is at issue in this case.

Mr. Cadwell's uncontradicted testimony is that he did not believe that the policy covered fraud. [App. 118-21.] He did not seek coverage for fraud liability, and he did not think that he had acquired any fraud coverage. [App. 759 (¶¶ 14-15).]

B. The Multimedia Policy.

The Multimedia Policy is not a comprehensive liability policy. It is a "specified risk" indemnity policy covering only specified torts in connection with broadcast or publication of material. [App. 2-3 (Policy Section I).] Chief among those are libel and slander, but the policy also covers related torts such as invasion of privacy, copyright infringement, and trespass in the acquisition or publication of a story. [*Id.* Section I(a)(1)-(6).]

The policy also covers negligent broadcasting or publishing mistakes that cannot be pigeonholed into traditional torts such as libel, slander or invasion of privacy. *See, e.g., Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983) (publisher of a book of airport approach information sued for erroneous information which allegedly resulted in crash). These non-traditional negligent publication claims are covered by Section I(a)(7) of the policy [App. 2] which covers liability arising from

> *negligent* error, omission, misstatement or misleading statement [in the broadcast or publication of material][emphasis added].

The Multimedia Policy does not contain any provision covering liability for *fraudulent* error, omission, misstatement or misleading statement in broadcasts or publications.

C. Claims By Lifetime Partners.

In 1987, certain PTL "lifetime partners" filed lawsuits (including the *Teague* Class Action) against Bakker and others.[3] The lifetime partners contributed money to PTL for the right to stay in PTL's accommodations for a certain number of nights each year. The "partners" sued when PTL could no longer provide the promised accommodations after its bankruptcy in the wake of the Jessica Hahn scandal in 1987. They alleged that Bakker fraudulently oversold the lifetime partnerships and diverted

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[3] Despite the Multimedia Policy's prompt notice requirement, [App. 5-6 (Section VII)], neither Bakker nor anyone else notified ERC of these lawsuits – or contended that the claims were covered by the Multimedia Policy – for more than two years. [App. 881-882 (¶¶ 3-4).]

PTL assets, knowing that PTL could not provide the promised accommodations. [App. 575-682.]

D. The Judgment Against Bakker.

The basis of the class action judgment against Jim Bakker is clear. He already had been convicted of wire fraud, mail fraud and conspiracy for the same conduct. [App. 753.] Teague told the jury that

> on October 5, 1989, Jim Bakker was convicted of Lifetime Partnership fraud. On those same set of facts that Jim Bakker was convicted on, we are bringing this cause of action.

[App. 754.] Not surprisingly, the verdict against Bakker was *expressly and solely* for common law fraud. [App. 713-17.]

SUMMARY OF ARGUMENT

This is not an appropriate case for certiorari because the only issue is the application of North Carolina substantive law to determine whether the Multimedia Policy covers the judgment for common law fraud. Teague's attempt to disguise that state law issue as a federal question cannot withstand scrutiny. Contrary to his argument, the circuits are not split on the summary judgment standard. More important, the courts below did not "weigh" any evidence or impose any burden of proof on Teague. North Carolina law makes interpretation of the Multimedia Policy a question of law to be decided by the court based solely on the face of the policy without resort to extrinsic evidence. Questions about "burden of proof" and "evidence weighing" are irrelevant when the sole task before the court is making a legal interpretation, not

deciding whether there is enough evidence to create an issue of fact.

Even if it were proper for Teague to use this court to rehash state law issues on which he has been fully heard in two courts, his petition is without merit. The district court and the Fourth Circuit applied the plain meaning of the Multimedia Policy as required by North Carolina law and reached the same conclusion as other courts considering similar policy language. Teague's effort to avoid the policy's plain meaning through strained readings, parol evidence and mischaracterizations of the evidence are contrary to North Carolina law.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW BY THE SUPREME COURT.

This case did not involve federal law. The sole issue was controlled by state law, and the courts below followed procedural principles upon which the Supreme Court and all circuits agree. The decision has little significance to anyone beyond the parties to this case – a fact emphasized by the absence of any reported opinion. Teague simply quarrels with the application of North Carolina law by the district court and the Fourth Circuit, and he seeks a third bite at the apple in violation of this Court's long-standing admonition that the certiorari jurisdiction exists solely

> to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to

> give the defeated party in the Circuit Court of Appeals another hearing.

Magnum Import Co. v. Coty, 262 U.S. 159 (1923).

A. The Court Should Not Grant Certiorari To Second Guess The Fourth Circuit's Application Of North Carolina Law.

Teague does not dispute that North Carolina law governs this case. No such dispute would be possible. The case is in federal court only because of the parties' diverse citizenship, and the sole issue is interpretation of an insurance policy issued to an insured in North Carolina.

Teague does argue, however, that the district court and the Fourth Circuit misapplied North Carolina law. [Petition for Certiorari at 15-31]. As shown in Part II below, that argument is wrong; but it would not justify review by the Supreme Court in any event.

The Supreme Court has long recognized that it does not exist to second guess the courts of appeal on state law questions. *E.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944):

> [O]rdinarily we accept and therefore do not review, save in exceptional circumstances, the considered determination of questions of state law by the intermediate federal appellate courts . . .

See also, Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations [of state law] in the first instance."). Thus, the Court seldom has granted certiorari to review state law decisions, and in 1980 it deleted from its rules

the provision for certiorari to review state law issues. 13 *Moore's Federal Practice* ¶ 810.25-1[3].

This is not a case in which the Court should depart from its practice of deferring to the courts of appeal on state law issues. The Fourth Circuit and district court correctly applied North Carolina law, and their decisions are unlikely to govern a substantial number of other cases since they were unreported and relate solely to the interpretation of the Multimedia Policy with respect to one type of judgment.

B. Teague's Attempt To Create The Illusion Of A Federal Question Is Without Merit.

Teague fails in his attempt to disguise the controlling state law question as a federal issue. Teague's theory is that the Court should grant certiorari to resolve a split among the circuits about the propriety of weighing evidence on a motion for summary judgment and the role of the burden of proof on summary judgment. [Petition for Certiorari at 7-14.]

While no such split among the circuits exists, this would not be an appropriate case for resolving the split if it did exist. Contrary to Teague's argument, the Fourth Circuit neither weighed any evidence nor imposed any burden of proof on Teague. Indeed, those concepts had no relevance to its decision because North Carolina substantive law made interpretation of the Multimedia Policy an issue of law, not a question of fact.

The Fourth Circuit correctly noted that the facts material to ERC's motion for summary judgment under controlling North Carolina law were – and are – undisputed. The Multimedia Policy is in writing [App. 1-26], and the parties do not dispute its contents. Nor does any

dispute exist about the basis for Bakkers' liability to the lifetime partners. The fraud judgment against Bakker [App. 713-17] and Bakker's criminal indictment and conviction for the same conduct [App. 725-53] are both in writing. The *Teague* verdict was expressly for common law fraud.

The Fourth Circuit noted correctly that North Carolina law makes interpretation of the Multimedia Policy on these undisputed facts a question of law, and it based its decision squarely on that controlling principle of North Carolina substantive law, not on weighing the evidence:

> Since there is no dispute regarding the facts, and the matter is reduced to a narrow question of contract interpretation, we must decide only whether ERC is entitled to judgment as a matter of law under the policy. *Radiator Specialty Company v. First State Insurance Company*, 651 F.Supp. 439 (W.D.N.C. 1987), *aff'd*, 836 F.2d 193 (4th Cir. 1987).
>
> * * *
>
> Under North Carolina law, which controls, unambiguous policy language is to be considered without resort to extrinsic evidence to "aid" in its interpretation. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 401 S.E.2d 126, 128 (N.C. 1991). The District Court therefore properly declined to consider Teague's proffers of extrinsic evidence . . .

[Appendix to Petition for Certiorari at A-4 and A-5.]

Nor did the Fourth Circuit impose any burden of proof or burden of production on Teague.[4] There are no

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[4] Contrary to Teague's argument, he would bear the burden of proof if there were any material issues of fact relating to

burdens of proof or production on issues of law. All relevant facts (i.e. the text of the Multimedia Policy and the Teague Class Action judgment) were before the Court.

The Fourth Circuit's conclusion that interpretation of the Multimedia Policy is an issue of law was compelled by three well-established principles of North Carolina law.

First, North Carolina, like most American jurisdictions, has long held that interpretation of an unambiguous insurance policy or contract is a question of law for the court. *E.g., Barbee v. Harford Mutual Ins. Co.*, 330 N.C. 100, 102, 408 S.E.2d 840, 841 (1991); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690-91, 340 S.E.2d 374, 377 (1986). No fact issue is present – and extrinsic evidence may not be used to interpret the contract – unless *the court* first decides that the contract is ambiguous. *United States for Westchester Elec. v. Sentry Ins.*, 774 F.2d 80, 84 (4th Cir. 1985) (applying North Carolina law).

Second, under North Carolina law, "[t]he determination whether the terms of a policy are . . . ambiguous is one of law for the court." *Squires v. Textile Ins. Co.*, 250 N.C. 580, 585, 108 S.E.2d 908, 911 (1959). The North Carolina Supreme Court cogently stated the controlling

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coverage. Under North Carolina law, the claimant under an insurance policy bears the burden of proving the material facts relating to coverage. *See, e.g., Kirk v. Nationwide Mut. Ins. Co.*, 254 N.C. 651, 654, 119 S.E.2d 645, 647 (1961) (burden on party claiming benefits under insurance policy to show coverage); *Slaughter v. State Capital Life Insurance Co.*, 250 N.C. 265, 108 S.E.2d 438 (1959) (insurer does not have burden of showing applicable exclusion unless insured first establishes that claim is within coverage); *Walker v. Durham Life Ins. Co.*, 90 N.C.App. 191, 193, 368 S.E.2d 43, 45 (1988).

principle in *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 122 S.E.2d 518, 522 (1970)(emphasis added):

> No ambiguity . . . exists unless, *in the opinion of the court*, the language of the policy is *fairly and reasonably* susceptible to either of the constructions for which the parties contend. [Citation omitted]. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

Third, North Carolina law precludes use of parol evidence to create ambiguity. *E.g., S&F Trading Co. v. Carson*, 87 N.C. App. 602, 604, 361 S.E.2d 897, 899 (1987) (rejecting use of extrinsic evidence to create ambiguity as "circular"). North Carolina is not unique. *See, e.g., Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990) (under New York law, court must determine whether contract is ambiguous by reference to contract alone); *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) ("We agree . . . that [under Oregon law] parol evidence should not be allowed in for the purpose of creating an ambiguity."); *Amos v. Coffee*, 228 Va. 88, 93, 320 S.E.2d 335, 338 (Va. 1984) (holding, under Virginia law, that " '[p]arole evidence cannot be used to first create an ambiguity and then remove it.' " (quoting *Cohan v. Thurston*, 223 Va. 523, 292 S.E.2d 45, 46 (Va. 1982)); *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 620 (Tex. Ct. App. 1991) ("In the absence of ambiguity on the face of the [insurance] contract, parol evidence is not available to create ambiguity."); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 572, 498 N.Y.S.2d 344, 346,

489 N.E.2d 231, 233 (N.Y. 1986) ("[W]e should determine if there is any ambiguity by the contractual language alone, without reference to extrinsic evidence.").

Accordingly, ERC's motion for summary judgment did not require either the district court or the Fourth Circuit to weigh any evidence or allocate the burden of proof or burden of production. Indeed, that would have been contrary to North Carolina law. Rather, the courts simply had to read the plain English language of the Multimedia Policy and apply it according to its terms, unless *in the court's opinion* the language was ambiguous. Both courts concluded that the language was *not* ambiguous. Hence no fact issue arose.

The cases which Teague cites [Petition for Certiorari at 12-13] do not establish a split among circuits on the standards for summary judgment. For example, Teague cites *Country Floors, Inc. v. Partnership*, 930 F.2d 1056, 1061-62 (3rd Cir. 1991) for the proposition that the Third Circuit endorses weighing of evidence. [Petition at 13.] In fact, the Third Circuit's opinion in *Country Floors expressly rejects* weighing the evidence. 930 F.2d at 1061-62. Nor do any of the other cases cited by Teague endorse weighing the evidence. Teague cites seven cases as opposing weighing and four cases as supporting weighing. [Petition for Certiorari at 12-13.] If the Court were to shuffle those eleven opinions together, it would have difficulty separating them again into the two categories without consulting the Petition. The cases which Teague cites in the two categories are, as groups, indistinguishable.

More important, the cases which Teague cites deal with an issue not present here. Those cases are concerned with the quantum of evidence necessary to create a genuine issue about the existence or non-existence of a *fact*

once it has been determined that the fact is *material* under the controlling substantive law. That issue is not present here because, under controlling North Carolina law, this case presents an issue of law, not a question of fact. In addition, as the Fourth Circuit properly found, North Carolina law prohibits use of the extrinsic evidence proffered by Teague in resolving that question of law.

Thus, in the final analysis, Teague really quarrels with the Fourth Circuit's application of North Carolina law, not with its interpretation of the federal summary judgment standard. As shown, that is not an appropriate basis for certiorari, especially since the Fourth Circuit decided the state law question correctly.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF THE MULTIMEDIA POLICY DOES NOT INDEMNIFY JAMES O. BAKKER AGAINST LIABILITY FOR HIS OWN FRAUD.

Although Teague's lengthy state law arguments do not present a proper basis for certiorari, ERC nevertheless responds below to show that the Fourth Circuit and district court correctly applied North Carolina law.

A. North Carolina Law Does Not Permit Creation of Indemnification for Bakker Against Liability for His Own Fraud Through Distortion of the Policy Language.

The Multimedia Policy does not indemnify Bakker against liability for his own fraud. It covers only specified torts, and fraud is not specified. Under North Carolina law, ERC is not liable for a risk it did not assume. *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522.

Contrary to Teague's argument, Section I(a)(7) does not indemnify Bakker for the fraud judgment. It plainly covers only *"negligent* error, omission, misstatement or misleading statement" – not *fraudulent* error, omission, misstatement or misleading statement. Teague tries to rewrite Section I(a)(7)'s coverage by arguing that the policy should be read as if "negligent" modifies only "error" rather than the entire phrase which it precedes. This "Teague Revision" ignores the fundamental principle of North Carolina law that insurance policies must be read according to ordinary English usage. *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379; *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978). As a consequence, courts applying law like that of North Carolina consistently have rejected similar arguments.

In *Golf Course Superintendents Ass'n of America v. Underwriters at Lloyd's, London*, 761 F. Supp. 1485, 1489-90 (D. Kan. 1991), for example, the court rejected, as a matter of law, an insured's claim that virtually identical policy language covered intentional retaliation for filing a civil rights charge:

> The insurance contract covers liability for "wrongful acts" which are defined as *"any negligent act, error, omission, misstatement or misleading statement."* Intentional conduct . . . is not contained in this definition. [Citations omitted.] [The insured] contends that the definition of "wrongful act" is ambiguous and should be liberally construed in favor of [the insured.] [The insured] argues that "negligent" in the phrase "negligent act, error, omission, misstatement or misleading statement" could be interpreted as modifying only the word "act." . . . We disagree . . . . We believe it makes better sense and

> captures the intent of the parties to construe the definition of "wrongful acts" so that the word "negligent" modifies every relevant term of the definition. It would be self-defeating to limit the definition of "wrongful act" to negligent acts, but at the same time cover intentional errors or omissions. [Emphasis added.]

Other courts have reached the same result. *See, e.g., Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 667 (Minn. App. 1988) (professional liability policy covering claims for "any negligent act, error or omission" is *clear and unambiguous* and does not cover omission to perform contractual duties unless done negligently); *Employer's Reinsurance Corp. v. Martin, Gordon & Jones, Inc.*, 767 F. Supp. 1355, 1362 n.2, (S.D Miss. 1991) (holding that phrase "negligent act, error or omission of the Insured" includes only *negligent* errors, thus concluding that "negligent" modified all terms in the series); *Reliance Insurance Co. v. General Reinsurance Corp.*, 506 F. Supp. 1042, 1044, 1050 (E.D. Pa. 1980) (holding that endorsement covering "any negligent act, error or omission" does not cover intentional or willful conduct); *School Dist. No. 1 v. Mission Insurance Co.*, 58 Or. App. 692, 701, 650 P.2d 929, 935 (1982) (holding that policy covering claims for "any negligent act, error or omission" does not cover intentional discrimination, only negligent discrimination).

These cases apply the ordinary meaning of the policy language, just as North Carolina law requires. In normal usage, an adjective preceding a conjoined series of nouns modifies each noun in the series. For example:

1. The bakery was filled with delicious cakes, pies, cookies and pastries.
2. Countless judges, lawyers and legal scholars have pondered the meaning of "proximate cause."

No one familiar with English would think that the first illustration means that only the cakes were delicious; nor does the second example mean that only the judges are countless. Rather, the adjective modifies *each* noun (or noun phrase) in the series. Normal usage avoids unnecessary repetition by using the adjective to modify the entire series rather than clumsily repeating it.

The technical term for this common grammatical practice is "ellipsis" or "elliptical construction" – a phrase or sentence in which words are omitted in order to avoid unnecessary repetition. *Sirvint v. Fidelity & Deposit Co.*, 242 A.D. 187, 272 N.Y.S. 555, 557 (N.Y. App. Div. 1934), *aff'd*, 266 N.Y. 482, 195 N.E. 164 (1934); J. Hodges & M. Whitten, *Harbrace College Handbook* 512 (10th ed. 1986). Contrary to the Teagues' contention [Petition for Certiorari at 20], this is not an outdated grammatical concept no longer in use. Indeed, the Teagues themselves use adjectives to modify entire series of nouns. Paragraph 60 of their crossclaim, for example, alleges that Bakker intended to defraud them "by means of *false* or *fraudulent* pretenses, representations, or promises." "False" and "fraudulent" modify all three nouns in the series, not just "pretenses." What's more, Congress uses the same pattern. For example, 18 U.S.C. § 1341 (Supp. 1989) prohibits fraudulent use of "any *counterfeit* or *spurious* coin, obligation, security, or other article . . . " (emphasis added). The underlined adjectives modify all nouns in the series, not just the first term. *Also see, e.g.*, 18 U.S.C. § 1342 (1988); 18 U.S.C. §§ 1341 and 1343 (1988).

The Multimedia Policy itself contains numerous examples of a single adjective modifying a series of nouns. Section I(b)(1) covers "false arrest, detention or imprisonment . . . ." [App. 2.] Plainly, "false" modifies all

three nouns in the series. "False arrest," "false imprisonment" and "false detention" are synonyms for the same tort.[5] Similarly, Section II(a)(5) refers to "bodily injury, sickness, disease or death of any person." The adjective "bodily" in that phrase modifies the entire phrase, not just "injury." *See Chatton v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992); *Presidential Hotel v. Canal Ins. Co.*, 188 Ga. App. 609, 611, 373 S.E.2d 671, 672 (1988); *E-Z Loader Boat Trailers v. Travelers Indemn. Co.*, 106 Wash. 2d 901, 908, 726 P.2d 439, 443 (1986) (*en banc*); *Guardian Life Ins. Co. of America v. Richardson*, 129 S.W.2d 1107 (Tenn. App. 1939). At least seven other examples appear throughout the Multimedia Policy [App. 3 (Section I(a)(3) and Section II(a)(2)); App. 4 (Section IV(a)(2) (two examples), Section IV(a)(3), Section IV(c)) and App. 7 (Section X).[6]

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[5] The policy includes all three terms because the same tort is known by differing names in various jurisdictions. *See, e.g., Prosser & Keeton on the Law of Torts* 47 (5th ed. 1984); *Haigler v. City of New York*, 521 N.Y.S.2d 428 (N.Y. App. Div. 1987); *Butler v. City of Vero Beach*, 495 So. 2d 266 (Fla. Dist. Ct. App. 1986); *Keys v. Sambo's Restaurant, Inc.*, 389 So. 2d 1360 (La. Ct. App. 1980), *aff'd*, 398 So.2d 1083 (La. 1981).

[6] Teague's purported counter examples are without merit. For example, Section I(a)(4) – which excludes coverage for liability arising "under any workman's compensation, unemployment compensation or disability benefits law" – does *not* use one adjective to modify a series of nouns. Rather, it contains a series of adjective phrases – "workman's compensation," etc. – that modify the single noun "law." Thus, each adjective phrase is the functional equivalent of a single word. Indeed, they are so commonly used as single words that they have their own dictionary entries. *See, e.g., Webster's Third New International Dictionary* 2635 (defining "workman's compensation insurance");

The North Carolina courts have recognized elliptical phrases in insurance policies. In *Big B Transportation, Inc. v. U.S. Ins. Group*, 93 N.C. App. 233, 234, 377 S.E.2d 278, 279 (1989), the policy covered "liability of the Insured as a carrier under bills of lading or shipping receipts *issued by the Insured* . . . " (emphasis added). The court rejected the insured's contention that the adjective phrase "issued by the Insured" modified only "shipping receipts." The court said that the only *reasonable* way to read the policy was that "issued by the insured" modified *both* "bills of lading" and "shipping receipts" – even though it appeared after only one of the terms. *Id.* at 235, 377 S.E.2d at 279. And *see, Strother v. North Carolina Farm Bureau Mutual Ins. Co.*, 90 N.C. App. 734, 735-36, 370 S.E.2d 82, 83 (1988), *rev. denied*, 323 N.C. 369, 373 S.E.2d 556 (N.C. 1988) (holding that words in an insurance policy modified entire series of nouns, not just immediately adjacent noun).

In short, Section I(a)(7) of the Multimedia Policy follows common English usage – a usage which is (i) repeated throughout the policy, (ii) used in the Teagues' own pleadings and in federal statutes, and (iii) recognized by numerous courts and authorities on usage.

Contrary to Teague's assertion [Petition for Certiorari at 16-18], his strained interpretation does not give significance to each word. As the courts below recognized, the Teague Revision would nullify the word "negligent" in Section I(a)(7). It would be illogical for the policy to limit coverage for "errors" to negligent errors if, as the Teagues contend, it covers all omissions. Just as a surgeon's

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Id. at 2493 (defining "unemployment compensation"). *Cf., Id.* at 642 (defining "disability insurance").

"error" in leaving a sponge inside a patient can be characterized as an omission to remove it, any "error" by a broadcaster can be characterized as an omission, a misstatement or a misleading statement. Thus, the insured could always circumvent the restriction to "negligent error" by characterizing a claim as an omission. *See Golf Course Superintendents*, 761 F.Supp. at 1490 ("[i]t would be self-defeating to limit [coverage] to negligent acts, but at the same time cover intentional errors or omissions.") Common sense compels the conclusion that "negligent" was meant to have practical significance, not the nugatory effect created by the Teague Revision. *See Wachovia Bank*, 276 N.C. at 355, 172 S.E.2d at 522 ("Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction . . .).

B. The Policy Is Not Ambiguous Under North Carolina Law.

Because Teague cannot seriously argue that a natural reading of Section I(a)(7) indemnifies Bakker for his own fraud, he spends much of his Petition trying to create some imaginary ambiguity which he can exploit to create coverage not contemplated by either ERC or PTL at the policy's inception. The cases cited above reject that contention.

Ultimately, Teague depends on a misconception of "ambiguity" under North Carolina law. Contrary to his apparent belief, a policy is not ambiguous simply because inventive counsel can conceive of a "possible but unlikely meaning [for policy language]." *Port of Portland*, 796 F.2d at 1194 (citing *Western Fire Ins. Co. v. Wallis*, 289 Or. 303,

308, 613 P.2d 36, 38-39 (1980)). Rather, a policy is ambiguous only if it is *reasonably* subject to different interpretations by a person in the place of the insured. *Wachovia Bank*, 276 N.C. at 354, 172 S.E.2d at 522 (quoted at p. 12 above). "The key word in this [principle] is 'reasonably.' " *Radiator Specialty*, 651 F. Supp. at 442.

Thus, Teague cannot establish that Section I(a)(7) of the Multimedia Policy is ambiguous by showing that a strained, distorted reading might lead to a different result. *See Waste Management*, 315 N.C. at 695, 340 S.E.2d at 379 (reinstating summary judgment for insurer with observation that "[a]lthough it is possible to perceive ambiguity in the policy language, it strains at logic to do so.").

Teague tries to circumvent these fundamental principles of North Carolina law by arguing that the policy contains a "latent ambiguity." [Petition for Certiorari at 21-27.] In doing so, however, he proves only that he does not understand what "latent ambiguity" means under North Carolina law. The North Carolina Supreme Court defined "latent ambiguity" in *Redd v. Taylor*, 270 N.C. 14, 22, 153 S.E.2d 761, 766 (1967):

> [a] latent ambiguity occurs when the words of an instrument are plain and intelligible, but extrinsic facts are necessary to identify the person or thing mentioned therein. A latent ambiguity, therefore, presents a question of identity – a fitting of the description in the will to the person or thing the testator intended.

Accord: Queens Ins. Co. of America v. Meyer Milling Co., 43 F.2d 885, 887 (8th Cir. 1930) (cited by Teague). The classic example of latent ambiguity is a contract requiring the purchase of goods "arriving on the ship Peerless from Bombay" when, unknown to the parties, there are two

different ships by that name arriving from Bombay. *E.g., Raffles v. Wichelshause*, 2 Howd. N.C. 906, 159 Eng. Rep. 375 (Ex. 1869).

The North Carolina Supreme Court recently reaffirmed this definition of "latent ambiguity" and emphasized that the latent ambiguity doctrine does *not* permit the use of extrinsic evidence "to alter or affect the construction of [the instrument itself]." *Britt v. Upchurch*, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990).

In this case, Teague is not trying to use extrinsic evidence to resolve a latent ambiguity. That is, he is not using the evidence to identify a person or thing to which the policy refers. Rather, he attempts to use it to argue that the policy's words mean something other than their ordinary meaning – he seeks to use extrinsic evidence "to alter or affect the construction" of the policy. This is exactly what the North Carolina Supreme Court's decision in *Britt* says that he cannot do.

C. The Lower Courts Properly Rejected Teague's Attempt To Find Ambiguity Through Strained Reading And Irrelevant Extrinsic Evidence.

1. It Is Irrelevant That Other Policy Provisions Create Other Types Of Coverage.

Contrary to Teague's argument [Petition for Certiorari at 21], he is not helped because parts of the Multimedia Policy *other than Section I(a)(7)* cover libel, invasion of privacy and other torts generally categorized as "intentional." Not even Teague contends that fraud is one of the "intentional" torts specified in Sections I(a)(1)-(6). Rather, he relies solely on Section I(a)(7) which expressly covers only negligent conduct. It makes no sense for Section

I(a)(7) to begin with the word "negligent" if, as Teague argues, it was intended to cover intentional conduct.

2. The Absence Of A Fraud Exclusion Is Irrelevant Unless The Coverage Provision Creates Fraud Coverage.

Teague is also wrong in arguing that ERC must indemnify Bakker for his fraud because the policy does not expressly exclude fraud. [Petition for Certiorari at 20-21.] Under North Carolina law, analysis must begin with the coverage section. The policy is for specific perils: it covers a claim only if it falls within the coverage affirmatively granted. *See, e.g., Wachovia Bank*, 276 N.C. at 358, 172 S.E.2d at 525 (holding that absence of express exclusion of cumulating limits of "medical payments" provision did not expand coverage beyond affirmative grant of coverage); *Slaughter*, 250 N.C. at 269, 108 S.E.2d at 441 (insurer does not have burden of showing applicable exclusion unless insured first establishes that claim is within coverage; *either* lack of coverage *or* exclusion would preclude claim).[7]

Many other jurisdictions agree with North Carolina on this point. *See, e.g., American Home Assurance Co. v. Osbourn*, 47 Md. App. 73, 82, 422 A.2d 8, 14 (Md. Ct. Spec.

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[7] Nor does the exclusion for criminal fines and penalties make absence of an express fraud exclusion significant. [Petition for Certiorari at 20-21.] That exclusion is necessary because some of the torts expressly covered – *e.g.*, trespass – could result in "criminal" fines or penalties in some jurisdictions. In contrast, since fraud is *not* a specified tort, the policy does not need to exclude it. *Cf. LeDoux v. Iowa Nat. Mut. Ins. Co.*, 262 N.W.2d 418, 421 (Minn. 1978) (exclusions have no bearing on whether coverage sections are ambiguous).

App. 1980) (holding that issue of exclusion was irrelevant, since coverage clause did not create coverage); *Smith v. Nationwide Mut. Ins. Co.*, 214 Conn. 734, 741, 573 A.2d 740, 743 (1990) (whether claim covered was "a question of coverage, not exclusion"); *McMahon v. Boston Old Colony Ins. Co.*, 67 A.D. 2d 757, 758, 412 N.Y.S.2d 465, 467 (N.Y. App. Div. 1979) ("[B]efore the need for an exclusion arises, there must first be coverage. . . . "); *Urtado v. Shupe*, 33 Colo. App. 162, 165, 517 P.2d 1357, 1359 (1973), *aff'd en banc*, 187 Colo. 24, 528 P.2d 222 (1974) ("[I]t is not necessary that all limitations [on coverage] appear as exclusions . . . ."); *Golf Course Superintendents*, 761 F. Supp. at 1490 ("[t]he policy should *not* be construed only in light of what is expressly excluded. . . . ").

3. Language In Other ERC Policies Is Irrelevant.

There is no merit to Teague's argument that the Multimedia Policy is ambiguous because *other types* of ERC policies have different coverage provisions or express fraud exclusions. The North Carolina Supreme Court rejected a similar argument in *Wachovia Bank*, 276 N.C. at 358, 172 S.E.2d at 525. In that case, the court rejected the argument that the insurer's addition of exclusionary language to later versions of the same policy constituted evidence that the earlier version without the exclusionary language was ambiguous:

> Nor does the fact that the company has now included such provision in the medical payments section [of other policies] show that it recognized a pre-existing ambiguity therein. *To insert a provision which will eliminate the remotest possibility of litigation upon a given theory is not to*

> *be deemed a recognition of the reasonableness of such theory in the absence of such provision in the policy.*

276 N.C. at 358, 172 S.E.2d at 525. (emphasis added). *Accord: Nationwide Mut. Ins. Co. v. Akers*, 340 F.2d 150, 156 (4th Cir. 1965) (Virginia law) (rejecting contention that subsequent revision of statutory policy form to expressly exclude certain coverage created inference that such coverage existed under the old form).

Thus, under North Carolina law, interpretation of PTL's Multimedia Policy would not be affected even if ERC (contrary to fact) had subsequently revised its multimedia policy form to include an express fraud exclusion. *A fortiori*, it is irrelevant that some ERC policies *other than the multimedia form* have an express fraud exclusion.

4. Teague's Purported Expert Affidavits Are Irrelevant.

Teague improperly attempts to create ambiguity through purported "expert" affidavits which are little more than briefs in affidavit form. The "experts" merely render opinions about whether the policy language is ambiguous or what it means. Under North Carolina law, these were legal issues for the courts to decide.

As succinctly stated in *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 475 F. Supp. 586, 592 (W.D. Pa. 1979), *modified on other grounds*, 632 F.2d 1068 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986 (1981):

> Complaint is made of exclusion of expert testimony of witness Ron Rodda who was called to interpret the meaning of the insurance contract. This is not permitted. The interpretation of the insurance contract is a matter for the court . . . . There is nothing in Rule 702 which would allow

> an expert to interpret a legal document and substitute his judgment for that of the court.

Accord: Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969) (holding that expert testimony is not permitted with respect to interpretation of contract); *County of Erie v. American States Ins. Co.*, 573 F. Supp. 479 (W.D. Pa. 1983) *aff'd.*, 745 F.2d 45 (3rd Cir. 1984) (holding that affidavit of purported expert on interpretation of policy language did not preclude summary judgment for the insurer); *Radiator Specialty*, 651 F. Supp. at 443 (expert affidavit purporting to interpret policy did not preclude summary judgment under North Carolina law). *Cf. Chatton v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 13 Cal. Rptr. 2d at ___ (opinion evidence not admissible to interpret unambiguous policy language). This authority is consistent with the North Carolina substantive rule that extrinsic evidence may not be used to modify policy language.

Although state law is conclusive, the same result would apply under the Federal Rules of Evidence. *E.g., Marx & Company, Inc. v. The Diners' Club, Inc.*, 550 F.2d 505, 509 n.11 (2d Cir. 1977), *cert. den.*, 434 U.S. 861 (1977); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 365-68 (4th Cir. 1986).

5. The Testimony Of Other Witnesses Is Irrelevant and Does Not Support Teague.

The North Carolina rule prohibiting use of extrinsic evidence to interpret or create ambiguity in plain contract language is fatal to Teague's reliance on deposition testimony to influence the court's decision of the legal issue in this case. *See Chatton*, 13 Cal. Rptr. at ___ (alleged admissions of insurer's employees that policy covered claim not admissible to change policy's plain meaning).

Moreover, Teague's Petition simply mischaracterizes that testimony.

The eighteen depositions taken by the Teagues reflect that PTL did not intend to buy and ERC did not intend to sell fraud coverage. *No deponent testified that he or she understood the Multimedia Policy to cover common law fraud.* To the contrary, those deponents who expressed an opinion – including Dave Cadwell who bought the policy for PTL – testified that they did not believe that it covers fraud. [App. 68-75, 113-27.] Mr. Cadwell clearly indicated that he understood the policy to cover only negligent acts, not intentional acts. [App. 759 (¶¶ 14-15); App. 113-27.] So did Mr. Heidenreich, another of PTL's agents. [App. 68-75.]

6. Teague May Not Use Non-Existent Facts To Support His Petition.

Teague's Petition is replete with non-sequiturs and "factual" statements which are not supported by the record. Those misstatements would not change the result of the case even if they were true, but they are not true. Space does not permit discussion here of all such mischaracterizations of the record. A few examples will suffice.

Teague falsely claims that ERC charged PTL a higher premium in exchange for shifting from the Broadcaster's Broadform (which Teague admits does *not* cover fraud) to the multimedia form. [Petition for Certiorari at 3, 6, 14, 17, 18, 19 and 29.] That argument is pure fantasy unsupported by any evidence. The record is undisputed that world-wide coverage was quoted *and bound* as "Broadcasters Broadform" coverage for a premium of $42,187. [App. 436 and 435.] The policy was then issued on the

multimedia form *with no increase in premium*. [*Compare* App. 435 and 436 (quote and binder for Broadcaster's Broadform) *with* App. 1 (Multimedia Policy Declarations).]

The cheaper quotation cited by the Teagues shows on its face that it was for coverage *limited to the United States and Canada*. [App. 437; *see also* App. 436.] In contrast, the coverage as bound was for *worldwide coverage*. [App. 1; 435.] Obviously worldwide libel coverage is more expensive than coverage for the United States and Canada only – especially since many foreign countries lack the First Amendment and due process protections available in this country. There is not a scrap of evidence that ERC charged a higher premium for shifting from broadcaster's broadform or for fraud coverage. No witness so testified. Dave Cadwell, who purchased the policy for PTL, certainly did not think that the premium was increased in exchange for fraud coverage. [App. 97-99; 120-29; 759.] Indeed, the shift from Broadcaster's Broadform to the multimedia form with no premium increase confirms that PTL did not pay for fraud coverage.

Teague states that ERC's underwriter, agent and attorney all admitted that the language was ambiguous. [Petition for Certiorari at 4, 26-27] This is false. Similarly, Teague claims that ERC's "agents" admitted coverage of non-negligent misstatements and one "even admitted the possible coverage of the Teague Class Action." [Petition for Certiorari at 4, 26-27] This is wrong. Not only does Teague mischaracterize the testimony, but there is no evidence that the "agents" were agents of ERC.

Even if North Carolina law permitted use of extrinsic evidence to avoid the plain terms of the policy, these and other unsupported statements in Teague's Petition for

Certiorari would not be probative. All of this purported "evidence" was argued to the Fourth Circuit.[8] Mischaracterizations of the record in a party's brief are not evidence and cannot create a material issue of fact – even if, contrary to North Carolina law, it were otherwise proper to modify a written insurance policy by extrinsic evidence.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied. This case does not present any substantial question of federal law. The unreported *per curiam* decision of the Fourth Circuit rests solely on state law, and Teague simply seeks an opportunity to rehash the same state law issues before this Court. That is not an appropriate use of the certiorari jurisdiction, and it should be rejected.

Respectfully submitted, this the 15th day of December, 1992.

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[8] Teague's false allegation that ERC withheld certain documents during discovery was briefed to and implicitly rejected by both courts below. The documents were produced to both sides by PTL, and Teague admitted in the courts below that his counsel had one of the documents for two years and simply forgot about it.